

STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the Matter of:)	Docket No. 97-AFC-1
)	
Application for Certification)	
for the High Desert Power Project)	
_____)	

**BRIEF OF COMMISSION STAFF ON THE COMMISSION'S
RESPONSIBILITY TO ANALYZE THE GROWTH-INDUCING
IMPACTS OF THE WATER SUPPLY PLAN FOR THE HDPP PROJECT**

Introduction

On February 10, 2000, staff and other parties to the High Desert Power Project (HDPP) proceeding filed testimony on the need for the Energy Commission to assess the potential for growth-inducing impacts associated with the water supply plan for the HDPP. Staff stated that the HDPP would have the potential to cause significant growth-inducing effects if staff's proposed conditions of certification are not adopted. Staff agreed that a more comprehensive analysis could shed additional light on this issue; however, no party has conducted such an analysis. As a result, failure to either impose the staff conditions, or consider a more detailed evaluation that may support alternative conditions will result in a decision that does not comply with the requirements of the Energy Commission's certified siting program and with the California Environmental Quality Act (CEQA).

This issue, together with several other topics related to site control, air quality, and dry cooling, were the subject of an evidentiary hearing on February 18, 2000. At the conclusion of the hearing, Commissioner Laurie directed parties to brief these issues by March 7, 2000. Because staff regards the other three issues as resolved, we only address the growth-inducing impacts of the water supply plan in this brief.

I.

In Accordance With CEQA, The Energy Commission Should Adopt Staff's Proposed Conditions To Prevent Potentially Significant Adverse Impacts Associated With The Use Of HDPP's Proposed Water Facilities

A. CEQA Requires The Lead Agency To Identify A Project's Potentially Significant Adverse Environmental Effects, Including Those That Are Growth-Inducing.

CEQA requires an analysis of all significant effects of a proposed project. (Pub. Resources Code, § 21100) Thus, the Energy Commission must evaluate all significant direct, indirect, and cumulative impacts the project might cause or to which it might contribute, including the potential to bring development and people into the area affected, or foster economic or population growth, or remove obstacles to population growth. (Pub. Resources Code, § 21100(b)(5), Cal. Code Regs., tit. 14, § 15126) A major expansion of a wastewater treatment plant might, for example, allow for more construction in service areas, the effects of which must be evaluated prior to approval by the Lead Agency.

The CEQA guidelines (Cal. Code Regs, tit. 14, § 15000 et seq.) and the courts provide a considerable amount of guidance on the scope of the Lead Agency's evaluation of growth-inducing impacts. For example, in City of Antioch v. City Council of the City of Pittsburg (1986) 187 Cal.App.3d 1325, 232 Cal.Rptr. 507, the court held that an EIR must assume the general form, location and amount of development that now seems reasonable to anticipate from a project. The level of detail included in the analysis is dependent upon the type of project, with a planning project requiring less specificity than a specific project development. (Cal Code Regs., tit. 14, § 15126) Moreover, a project cannot be considered in isolation from the development it presages. For example, in Antioch the City of Pittsburg issued a negative declaration for a proposed road and sewer construction project. However, the court found that because the construction project provided a catalyst for further development in the area, the Lead Agency must evaluate the effects of such future development. (Id. at 1337) The fact that future development might take several forms did not excuse environmental review; the city was required to analyze the forms and extent of future development that now reasonably seem most likely to result from the project. (Id. at 1338)

B. The HDPP Creates A Potentially Significant Adverse Growth-Inducing Impact Because Its Water Supply Plan Could Remove A Significant Obstacle To Growth.

Staff testified that *all* of HDPP's water related facilities are oversized. (Exh. 146a, p. 3) In addition, the aquifer storage and recovery agreement entered into between Victor Valley Water District (VVWD) and the applicant allows VVWD use of the HDPP water facilities. (Exh. 145, §§ 8.3, 15) CEQA therefore requires that the Energy Commission evaluate the direct and indirect effects of such use. Staff's conclusion that VVWD's use of the facilities is clearly growth inducing is supported by the fact that such use makes available to VVWD an additional source of water in an area that has an extremely serious water shortage. Although VVWD could, in theory, obtain state water project (SWP) water for residential use absent the project, it cannot deliver it for residential use without the use of a treatment facility, which VVWD does not have, but which the HDPP would provide.

Staff did not have sufficient time to confirm the amount of additional growth that would be facilitated by VVWD's use of the HDPP water facilities.¹ However, Mr. Buell's uncontroverted testimony is that if VVWD's use of HDPP water facilities provides an additional 4,000 acre-feet per year of water (which staff considers to be a reasonable assumption, based on the information available in the limited time between the hearing notice and the hearing), this additional water would be sufficient to supply 12,000 new residents, or 25% of the current population. (Tr. 2/18/00, p. 205; staff; Buell) Such increases in population would likely lead to increased air emissions, increased wastewater and waste production, adverse impacts on ground water, increased traffic, and new demands on community services. None of these impacts are addressed by the conditions of certification contained in the Presiding Member's Proposed Decision. Staff's proposed conditions, on the other hand, would eliminate the potential of significant adverse environmental impacts from VVWD's use of the HDPP water facilities.

¹ Parties other than the applicant were unaware that VVWD planned to enter into a contractual arrangement with the applicant allowing unrestricted use of the water facilities until after the close of evidentiary hearings in October, 1999. As CEQA requires the Commission to consider the growth-inducing effects of VVWD's use of the HDPP water facilities, staff has provided an abbreviated assessment and associated conditions in the time available, in order to allow the HDPP proceeding to move forward consistent with the requirements of CEQA.

Staff's conclusion that the project has a potential to encourage substantial growth is not affected in any way by the fact that VVWD's use of the water treatment facility is limited to treatment of water used for injection into the aquifer. Because VVWD has unlimited ability to use HDPP wells to produce water from the aquifer, it can use all the excess capacity of the water treatment plant to treat water for storage in the aquifer that it later pumps to serve its residential customers.² Staff agrees that it is possible that VVWD's use of the facilities will not encourage growth, but will instead replace reliance on the groundwater pumping that is causing overdraft in the region and harming the habitat along the Mojave River.

However, because staff's testimony demonstrates that substantial growth has occurred and is likely to continue in the project area, staff believes it is more likely that VVWD will use new sources of water to meet the demand associated with this growth. (Exh. 82, p. 304) CEQA requires that the Energy Commission analyze growth-inducing impacts if there is "substantial evidence sufficient to support a fair argument that the project may have a significant growth-inducing effect." (Stanislaus Audubon Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144, 39 Cal.Rptr.2d 54) One reasonably foreseeable outcome of particular concern is that the increased availability of SWP water supports additional growth that then must be supported through additional use of groundwater when SWP water is not available. This would result not only in the typical growth-related impacts such as increased traffic and demand for services, but in additional deleterious effects on the Mojave River habitat as well. CEQA and the Energy Commission's certified siting program require the Energy Commission to consider these potentially significant adverse environmental impacts associated with VVWD's use of the oversized HDPP water facilities and to adopt feasible conditions that would avoid or mitigate such effects.

² There is a condition that subtracts from HDPP's available balance the amount of water that VVWD pumps that is in excess of the "baseline". But, because VVWD can replenish that balance through additional water injection, there is no actual limitation on the amount that VVWD can produce through use of HDPP wells.

C. Staff's Proposed Conditions Would Avoid Potentially Significant Adverse Environmental Impacts Otherwise Associated With VVWD's Use Of HDPP's Water Facilities.

Staff proposed several new conditions in its testimony that would effectively prevent the occurrence of any significant adverse environmental impacts associated with VVWD's use of the HDPP water facilities. These conditions are summarized on page 5 of Exhibit 146(a). They require ownership to rest with HDPP and to be revisited in the closure plan, and limit VVWD's use of the water treatment facility to emergency situations only. These conditions will prevent VVWD from using the oversized water facilities to obtain a new water supply that could facilitate unanticipated growth and create significant adverse environmental effects associated with that growth. Should HDPP and VVWD wish the Energy Commission to allow use outside the scope of those conditions, HDPP has the option of providing an analysis that is more detailed than that provided by staff in Exhibit 146(a) and that demonstrates that alternative conditions are appropriate.

In conclusion, in order to comply with the requirements of CEQA, staff strongly urges the HDPP Committee to carefully consider the direct, indirect, and growth-inducing impacts associated with VVWD's use of the HDPP water facilities. This consideration should include a recommendation to the Energy Commission that staff's proposed conditions be imposed in order to prevent the possibility that significant adverse effects will result from VVWD's use of the HDPP water facilities.

II.

**In This Case, CEQA Provides No Exceptions Or Exemptions
To The Requirement That Significant Adverse Growth-Inducing Impacts
Be Mitigated Or revented**

A. The Energy Commission's Obligation To Consider Growth-Inducing Impacts Is Not Affected By The Project's Consistency With The Applicable General Plan.

It is important to note that the fact that a project is consistent with a general plan does not relieve a Lead Agency from considering growth-inducing impacts, and imposing mitigation for any identified impacts. State law requires each county and city to prepare a general plan for

physical development within its boundaries and for development of any land outside its boundaries which bears relation to planning. (Gov. Code, § 65300) In addition, all development actions taken by the local government must be consistent with the General Plan. (Gov. Code, § 65860, Neighborhood Action Group for the Fifth District v. County of Calaveras (1984) 156 Cal.App.3d 1176, 203 Cal.Rptr. 401) Hence, *all* development projects within the state must be consistent with applicable general plans. An interpretation of CEQA that relieves Lead Agencies of their responsibility to consider growth-inducing impacts if a project is consistent with a general plan would render the statutory requirement meaningless – *no* projects would ever be subject to such an analysis.

B. A Lead Agency's Growth-Inducing Impact Analysis May Reference Local Planning Documents Only If Those Documents Discuss The Proposed Project And Overall Growth Targets And Limits.

In City of Carmel-by-the-Sea v. U.S. Department of Transportation, 123 F.3d 1142 (9th Cir. 1997), the court found that an EIR that did not discuss the potential for growth but referenced local planning documents which specifically included the proposed project in their growth plans and discussed overall growth targets and limits was adequate under CEQA. (*Id.* at 1165) Carmel involved the proposed construction of a road to ease congestion on Highway 1 near the city of Carmel. The city challenged the EIR claiming that the growth-inducing impacts of the road were insufficiently addressed. The court found that even though the EIR did not discuss the potential for economic or population growth it referenced several local planning documents that discussed overall growth targets and limits and specifically included construction of the road in their growth plans. The court held that this was sufficient to satisfy CEQA.

However, by contrast, there is no reference in the City of Victorville's General Plan to the HDPP.³ Thus, it would be improper for the Energy Commission to rely on the Victorville General Plan to evaluate the growth-inducing impacts associated with VVWD's use of the HDPP

³ Staff notes that both VVWD and the Mojave Water Agency have prepared planning documents that address water supply. However, neither the 1994 Regional Water Management Plan, prepared by the Mojave Water Agency (portions of which are included in Exh. 110), nor the 1995 Water Master Plan prepared by VVWD (which is not in the record) mention the HDPP.

water facilities. As a result, the Energy Commission must conduct its own analysis prior to approval of the project and impose conditions that will potential significant adverse impacts.

C. The Energy Commission's obligation to consider growth-inducing impacts is not affected by the fact that VVWD could build the same water treatment facilities itself.

Both the applicant and VVWD point out that VVWD has the authority to build facilities identical to the HDPP facilities, and that such action would not be subject to Energy Commission review. However, that is not relevant to the question of whether the Energy Commission must review VVWD's use of the HDPP water facilities in this proceeding. The Energy Commission is responsible for evaluating the entire project that is proposed. In this case, HDPP is asking the Energy Commission to issue a license that allows VVWD to use its water facilities. Thus, the Energy Commission must evaluate that aspect of the HDPP. If VVWD were to construct the facilities, it would be the Lead Agency and would have the same obligations as the Energy Commission does in this case to evaluate all impacts of the construction and use of those facilities, including the growth-inducing impacts.

D. The Energy Commission's Obligation To Consider Growth-Inducing Impacts Is Not Affected By The Fact That Other Projects It Has Reviewed Have Not Created A Potential For Growth-Inducing Impacts.

During cross-examination of staff witness Buell, the applicant asked whether the Energy Commission has conducted an analysis of growth-inducing impacts in other siting cases. The applicant's questions demonstrate that it fails to understand the difference between a power plant project that contains no elements that may foster foreseeable economic or population growth (or remove obstacles to population growth), and one which does. The HDPP project is one that does. The Energy Commission has never had a case before it that included a proposal to allow a local government to provide additional services to the community. The HDPP case, in contrast, would allow VVWD to access additional water supplies in an area that is severely affected by water shortages. This could remove an impediment to growth, facilitating development that would not otherwise be possible absent the proposal. That imposes a legal requirement upon the Energy Commission to evaluate that potential.

Conclusion

In conclusion, it is clear that VVWD's use of HDPP water facilities could create significant adverse growth-inducing impacts. The Energy Commission must consider those impacts prior to approving the project and impose conditions that prevent or mitigate those effects. Staff's proposed conditions, as identified in Exhibits 146a and 176, and as modified at the February 18, 2000 hearing, would prevent the significant adverse effects identified in its testimony. In the absence of an analysis of potential project effects that supports alternative mitigation for impacts associated with VVWD's use of the HDPP facilities, the Energy Commission should include staff's proposed conditions in its decision.

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Respectfully submitted,

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